

to grant retransmission consent or the right to mandatory carriage.<sup>149</sup> If a station elects retransmission consent, the broadcaster and an MVPD negotiate a carriage agreement, which may include monetary or other types of compensation in return for the right to carry the broadcast signal.<sup>150</sup> Where a station elects must carry, it is generally entitled to carriage but it is prohibited from receiving compensation.<sup>151</sup> Qualified local noncommercial educational (“NCE”) stations have a right to mandatory carriage within the same must-carry market, but do not have retransmission consent rights.<sup>152</sup> Cable operators also are permitted to negotiate for retransmission consent with any other broadcast station they seek to carry irrespective of the station’s television market.<sup>153</sup>

58. In recent years, some MVPDs’ and broadcasters’ negotiations have resulted in public retransmission consent disputes, leading a coalition of MVPDs and consumer groups to file a rulemaking petition with the Commission in 2010.<sup>154</sup> The petitioners argue that the Commission’s retransmission consent regulations are outdated and harmful to consumers.<sup>155</sup> The Commission issued a Notice of Proposed Rulemaking in 2011 seeking comment on several proposed revisions to its retransmission consent regime.<sup>156</sup> Among other things, the Commission sought comment on modifying the good faith negotiation standards to include additional negotiation violations, revising the “totality of the circumstances” standard used to determine whether actions in the negotiation process are undertaken in good faith, and altering the consumer notice requirements for retransmission consent disputes.<sup>157</sup>

59. Several commenters indicate that securing access to local and network broadcast programming is a critical component of a competitive MVPD market.<sup>158</sup> In particular, some commenters argue that the current retransmission consent regime provides each network-affiliated station with a monopoly over network programming within its local market.<sup>159</sup> This market power, commenters claim, allows broadcasters to exact substantial retransmission consent fees and to withhold such programming

(Continued from previous page) \_\_\_\_\_

assigned to only one market according to the market whose stations receive the preponderance of the audience in that county. Yet in a few cases where a county is large and viewing patterns differ significantly between parts of the county, a portion of the county is assigned to one television market and another portion of the county is assigned to another market. Several counties in Alaska, however, are not assigned to any DMA. *See STELA Report*, 26 FCC Rcd at 11921, ¶ 5 & n.10.

<sup>149</sup> 47 U.S.C. § 325(b)(3)(B); 47 C.F.R. §§ 76.56(b), 76.64.

<sup>150</sup> 47 U.S.C. § 325(b)(3)(C); 47 C.F.R. § 76.64. *See also STELA Report*, 26 FCC Rcd at 11923, ¶ 8.

<sup>151</sup> 47 C.F.R. § 76.60.

<sup>152</sup> 47 U.S.C. § 325(b)(2)(A).

<sup>153</sup> 47 U.S.C. § 325(b); 47 C.F.R. § 76.64. These carriage arrangements might be limited though by other contractual restrictions, such as network affiliation arrangements. *See STELA Report*, 26 FCC Rcd at 11923, n. 22.

<sup>154</sup> *See Amendment of the Commission’s Rules Related to Retransmission Consent*, MB Docket No. 10-71, Notice of Proposed Rulemaking, 26 FCC Rcd 2718, 2725-27, ¶¶ 13-16 (2011) (“*Retransmission Consent NPRM*”).

<sup>155</sup> *See id.* at 2725, ¶ 13.

<sup>156</sup> *See id.* at 2719, ¶ 1.

<sup>157</sup> *See id.* at 2729-38, ¶¶ 20-37.

<sup>158</sup> *See* DISH Network 6/8/11 Comments at 8; AT&T 6/8/11 Comments 8-9; DIRECTV 6/8/11 Comments at 25-26; RCN 8/28/09 Reply at 6-7; DIRECTV 5/20/09 Comments at 17-18. Small and rural carriers also raised retransmission consent concerns, which we address in Section IV.

<sup>159</sup> *See* DIRECTV 6/8/11 Comments at 26; DISH Network 6/8/11 Comments at 8-9; New Jersey 7/8/11 Reply at 9; DIRECTV 5/20/09 Comments at 18.

when their terms and conditions are not met.<sup>160</sup> Consequently, they welcome the Commission's review of its retransmission consent regime and encourage the Commission to reform its regulatory framework for retransmission consent.<sup>161</sup>

60. NAB and broadcast station licensees urge the Commission to refrain from adopting substantial changes to the existing retransmission consent rules,<sup>162</sup> or repealing any broadcasting-related exclusivity rules.<sup>163</sup> They argue that retransmission consent fees are necessary to help broadcasters sustain their ability to offer programming, particularly news that is relevant to their communities.<sup>164</sup> Furthermore, they state that historically broadcasters have not received cash compensation for their signals,<sup>165</sup> and even the fees paid by MVPDs today are significantly lower than the fees paid to cable networks with comparable or lower ratings.<sup>166</sup> NAB states that retransmission consent fees represent only a small fraction of MVPD programming costs.<sup>167</sup>

61. *Exclusivity Rules.* MVPDs carry local broadcast stations pursuant to the Commission's rules protecting a broadcast station's exclusive distribution rights in its respective market.<sup>168</sup> With respect to cable operators, the Commission's network non-duplication rules allow a local broadcast station to request that the duplicated programming be blacked out when carried on another station imported by the

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<sup>160</sup> See DISH Network 6/8/11 Comments at 8-9; AT&T 6/8/11 Comments 8-9; DIRECTV 6/8/11 Comments at 26-27; Verizon 6/8/11 Comments at 18; RCN 8/28/09 Reply at 7; DIRECTV 5/20/09 Comments at 18-19.

<sup>161</sup> See DIRECTV 6/8/11 Comments at 27; DISH Network 6/8/11 Comments at 9; Verizon 6/8/11 Comments at 18-20; AT&T 6/8/11 Comments at 8.

<sup>162</sup> See NAB 6/8/11 Comments at 17-18; NAB 7/8/11 Reply, Attachment A at iii (resubmitting its comments filed in MB Docket No. 10-71). See also, e.g., CBS Television Network Affiliates Association Comments, MB Docket No. 10-71 (filed May 27, 2011) ("CBS Affiliates 10-71 Comments"); Sinclair Broadcast Group, Inc. Comments, MB Docket No. 10-71 (filed May 27, 2011) ("Sinclair 10-71 Comments"); Belo Corp. Comments, MB Docket No. 10-71 (filed May 27, 2011) ("Belo 10-71 Comments").

<sup>163</sup> See NAB 7/8/11 Reply, Attachment B at 53-61; CBS Affiliates 10-71 Comments at 2-3; Gilmore Comments, MB Docket No. 10-71 (filed May 27, 2011) at 16; Joint Comments of Barrington Broadcasting Group, LLC, Bonten Media Group, LLC, Dispatch Broadcast Group, Gannett Co., Inc., Newport Television, LLC, Post-Newsweek Stations, Inc., and Raycom Media, Inc., MB Docket No. 10-71 (filed May 27, 2011) at 3-4; Belo 10-71 Comments at 2, 29-30.

<sup>164</sup> See, e.g., NAB 7/8/11 Reply, Attachment A at 7-10; CBS Affiliates 10-71 Comments at 1; CBS Corporation Comments, MB Docket 10-71 at 11 (filed May 27, 2011) ("CBS Corp. 10-71 Comments"); Sinclair 10-71 Comments at 14; Belo 10-71 Comments at 6.

<sup>165</sup> See, e.g., NAB 7/8/11 Reply, Attachment B at 16-17; Joint Comments of Gilmore Broadcasting Corp., Landmark Television, LLC, and Rockfleet Broadcasting, Inc., MB Docket No. 10-71 (filed May 27, 2011) at 6; CBS Affiliates 10-71 Comments at 15; Nexstar Broadcasting, Inc. Comments, MB Docket No. 10-71 (filed May 27, 2011) at 4; The Walt Disney Company Comments, MB Docket No. 10-71 (filed May 27, 2011) at 8-9; Allbritton Communications Corporation Comments, MB Docket No. 10-71 (filed May 27, 2011) at 2.

<sup>166</sup> See NAB 7/8/11 Reply, Attachment A at 15-18; Sinclair 10-71 Comments at 11 (citing Dr. Michael G. Baumann, *Proposal for Reform of the Retransmission Consent Good Faith Bargaining Rules: An Economic Analysis*; Economists Incorporated, May 27, 2011, at 7, attached as Exhibit 1 to the Sinclair Comments); CBS Affiliates 10-71 Comments at 14.

<sup>167</sup> See NAB 7/8/11 Reply, Attachment B at 2.

<sup>168</sup> See generally *SHVERA Report*, *supra*, n. 142, for a more detailed description of these rules.

system into the local station's zone of protection.<sup>169</sup> Similarly, the Commission's syndicated exclusivity rules allow a broadcaster to assert its right to black out syndicated programming for which it holds exclusive rights when carried by a cable operator within its zone of protection.<sup>170</sup> The Commission's sports blackout rule protects a sports team's or sports league's distribution rights to a live sporting event occurring in a local market. The rule prevents a cable operator from providing the live sporting event on a distant signal to a market where the game is blacked out on the local broadcast station.<sup>171</sup> As mandated by Congress, the Commission's network non-duplication and syndicated exclusivity rules and the sports blackout rule apply to satellite carriers.<sup>172</sup> The Commission has sought comment on the elimination of the network non-duplication and syndicated exclusivity rules as they apply to cable<sup>173</sup> and on a Petition for Rulemaking requesting the Commission to eliminate the sports blackout rule.<sup>174</sup>

62. *Ownership Limits.* Section 613(f) of the Act requires the Commission to establish reasonable limits on the number of subscribers a cable operator may serve nationwide ("horizontal" limit) and the number of channels a cable operator may dedicate to its affiliated programming networks ("vertical" limit).<sup>175</sup> Although the Commission adopted rules placing limitations on the horizontal and vertical ownership of cable operators,<sup>176</sup> these rules were struck down by the D.C. Circuit.<sup>177</sup>

63. *Public Interest Programming.* Pursuant to Sections 611 and 621 of the Communications Act, local franchising authorities may require cable operators to dedicate a portion of their channel capacity and provide financial support to public, educational, and governmental ("PEG") channels.<sup>178</sup>

<sup>169</sup> 47 C.F.R. § 76.92. For purposes of this rule, a broadcast station's zone of protection is 35 miles (or 55 miles in smaller markets). 47 C.F.R. § 73.685(m).

<sup>170</sup> 47 C.F.R. § 76.101. For purposes of this rule, a broadcast station has a 35-mile geographic zone of protection. 47 C.F.R. § 73.685(m).

<sup>171</sup> 47 C.F.R. § 76.111.

<sup>172</sup> 47 U.S.C. § 339(b); 47 C.F.R. §§ 76.122-23, 76.127. In 1999, Congress directed the Commission to extend the network non-duplication and syndicated exclusivity rules to satellite carriers, but only with respect to the retransmission of nationally distributed superstations. It also required the Commission to extend the sports blackout rules to the carriage of nationally distributed superstations and network stations. See SHVIA, P.L. No. 106-113, 113 Stat. 1501A-534.

<sup>173</sup> See *Retransmission Consent NPRM*, 26 FCC Rcd at 2740-43, ¶¶ 42-45.

<sup>174</sup> See *Commission Seeks Comment on Petition for Rulemaking Seeking Elimination of the Sports Blackout Rule*, MB Docket No. 12-3, Public Notice, 27 FCC Rcd 260 (MB 2012).

<sup>175</sup> 47 U.S.C. § 533(f).

<sup>176</sup> See *Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992 Horizontal and Vertical Ownership Limits*, MM Docket No. 92-264, Second Report and Order, 8 FCC Rcd 8565, 8567, ¶¶ 3-4 (1993). See also 47 C.F.R. §§ 76.503(a), 76.504(a)-(b).

<sup>177</sup> See *Time Warner Entm't Co. v. FCC*, 240 F.3d 1126, 1136, 1139 (D.C. Cir. 2001). In 2008, the Commission once again adopted a horizontal limit preventing an individual cable operator from serving more than 30 percent of MVPD subscribers nationwide, using more recent empirical data to reach the result. See *The Commission's Cable Horizontal and Vertical Ownership Limits*, MM Docket No. 92-264, Fourth Report and Order and Further Notice of Proposed Rulemaking, 23 FCC Rcd 2134, 2135, ¶ 1 (2008). The Commission also sought additional comment on its vertical ownership limit. See *id.* at 2187-96, ¶¶ 125-45. Despite the inclusion of more recent data, the D.C. Circuit struck down the revised horizontal ownership limit in 2009 for being arbitrary and capricious. See *Comcast Corp. v. FCC*, 579 F.3d 1, 10 (D.C. Cir. 2009).

<sup>178</sup> 47 U.S.C. §§ 531(a)-(b), 541(a)(4)(B). Comcast is subject to heightened PEG requirements after its merger with NBCU. In the *Comcast-NBCU Order*, the Commission reaffirmed the importance of PEG programming and (continued....)

The statute further requires cable operators to carry any PEG channels on their basic service tier.<sup>179</sup> In spite of these statutory requirements, some state video franchising laws have removed or reduced the PEG requirements provided in local franchising agreements, which has led to a reduction in PEG funding and support.<sup>180</sup>

64. Commenters express concern with the state of public interest programming. They indicate that PEG channels have suffered in recent years due to state franchising laws, anti-competitive conduct by cable and wireless companies, and the Commission's recent changes to its franchising rules.<sup>181</sup> Montgomery County, Maryland ("Montgomery County") contends that cable operators have not used advances in technology and service delivery to benefit PEG programming and that the required number of PEG channels has not kept pace with the increase in channel capacity on cable systems.<sup>182</sup>

65. The Alliance for Community Media ("ACM") submits a study with its comments finding that, among other things, PEG Access Centers in at least 100 communities have closed since 2005.<sup>183</sup> In addition, the study indicates that new state franchising laws and/or decisions by local governments are the primary reasons for reductions in funding and in-kind resources for PEG Access Centers.<sup>184</sup> Based on the study, ACM argues that PEG channels will disappear without increased regulatory support.<sup>185</sup>

66. Some commenters therefore encourage the Commission to issue a declaratory ruling concerning the Cable Act's carriage rules for PEG channels.<sup>186</sup> In 2009, the Commission received two petitions seeking a declaratory ruling clarifying the statutory rules and responsibilities of MVPDs with respect to the carriage of PEG channels. These petitions argue that AT&T's delivery of PEG programming on its U-verse system violates the Act. In particular, the petitioners' claim that AT&T's placement of PEG programming on a singular channel in its U-verse system is a violation of the Act

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imposed requirements on Comcast to protect the public interest as well as preserve diversity and localism in the video services marketplace. *See Comcast-NBCU Order*, 26 FCC Rcd at 4326, ¶ 213. The conditions prohibit Comcast from migrating PEG channels to a digital tier until all channels are converted to a digital format. They require carriage of all PEG channels on Comcast's digital starter tier. Comcast may not change the method by which it delivers PEG channels if the change would result in the material degradation of signal quality or impair viewer reception of PEG channels. *See id.* at 4326-27, 4376-77, ¶ 214 & App. A, § XIV. Comcast further agreed to develop a platform for hosting PEG content On Demand and On Demand Online within three years of closing the transaction. *See id.* at 4327, 4376-77, ¶ 215 & App. A, § XIV.

<sup>179</sup> 47 U.S.C. § 543(b)(7)(A)(ii); 47 C.F.R. § 76.901(a).

<sup>180</sup> *See PEG CRS Report* at 2-3.

<sup>181</sup> *See* ACM 6/8/11 Comments at 3; Anne Arundel 6/8/11 Comments at 12; Ohio Community Board 6/8/11 Comments at 2; Marin 6/8/11 Comments at 2; Oxnard Elementary 6/8/11 Comments at 2-3; Oxnard College 6/8/11 Comments at 1-2.

<sup>182</sup> *See* Montgomery County 7/8/11 Reply at 33; Montgomery County 5/20/09 Comments at 24.

<sup>183</sup> *See Analysis of Recent PEG Access Center Closures, Funding Cutbacks and Related Threats* at 2, submitted with ACM 6/8/11 Comments.

<sup>184</sup> *See id.*

<sup>185</sup> *See* ACM 6/8/11 Comments at 3.

<sup>186</sup> *See* Anne Arundel 6/8/11 Comments at 12-13; New Orleans 5/20/09 Comments at 16-17.

because it results in inferior PEG channel accessibility, functionality, and signal quality in comparison to other basic and non-basic channels on AT&T's U-verse system.<sup>187</sup>

67. In response, AT&T encourages the Commission not to establish federal requirements for PEG programming. It argues that the Act provides the Commission with narrow authority with respect to PEG programming. AT&T also asserts that the Act does not require the provision of PEG programming, but simply permits franchising authorities to require cable operators to set aside capacity for PEG programming.<sup>188</sup>

68. With regard to DBS MVPD carriage of public interest programming, in 1992, Congress established a public interest programming requirement that requires DBS operators to dedicate between four and seven percent of their capacity to public interest programming.<sup>189</sup> Under the Commission's rules, DBS operators must reserve four percent of their channel capacity for qualified programmers providing "noncommercial programming of an educational or informational nature."<sup>190</sup> DISH Network reports providing 24 channels of public interest programming.<sup>191</sup> DIRECTV carries several channels of public interest programming.<sup>192</sup>

69. *Leased Access.* Section 612 of the Communications Act requires cable operators to designate a portion of their channel capacity for commercial use by unaffiliated parties.<sup>193</sup> The requirement is intended to provide competition and diversity in the delivery of video programming.<sup>194</sup>

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<sup>187</sup> See *Petition for Declaratory Ruling that AT&T's Method of Delivering Public, Educational and Government Access Channels over its U-verse System is Contrary to the Communications Act of 1934, as amended, and Applicable Commission Rules*, MB Docket No. 09-13, Petition of ACM *et al.* (filed Jan. 30, 2009); *Petition for Declaratory Ruling on Requirements for a Basic Service Tier and for PEG Channel Capacity Under Sections 543(b)(7), 531(a) and the Commission's Ancillary Jurisdiction Under Title I*, MB Docket No. 09-13, Petition of the City of Lansing, MI (filed Jan. 27, 2009). See also *Entities File Petitions for Declaratory Ruling Regarding Public, Educational, and Governmental Programming*, MB Docket 09-13, Public Notice, 24 FCC Rcd 1340 (MB 2009). These petitions remain pending before the Commission.

<sup>188</sup> See AT&T 6/20/11 Reply at 9-10.

<sup>189</sup> 47 U.S.C. § 335(b)(1)(A). Qualified DBS providers may alter dedicated capacity to between 3.5 and 7 percent if they provide state public affairs networks to their subscribers in at least 15 states. 47 U.S.C. § 335(b)(1)(B).

<sup>190</sup> 47 C.F.R. § 25.701(f). In order to qualify, programmers need to be: (1) organized for a noncommercial, nonprofit purpose; (2) a national educational programming supplier; and (3) responsible for 50 percent of the direct costs the DBS provider occurs in making the programming available. See *id.* See also *13<sup>th</sup> Report*, 24 FCC Rcd at 652, ¶ 231.

<sup>191</sup> DISH Network carries the following public interest programming channels: 3ABN, Almaxvision, Baby First, Brigham Young University, C-SPAN, Christian Television Network, Classic Arts Showcase, EWTN, Free Speech TV, HITN, Impact Network, Kids & Teens Television, KBS World, Link Media Inc., NASA Channel, Pentagon Channel, Trinity Broadcasting Network, and V-ME. See DISH Network 7/29/09 Comments at 4, n. 3. DISH Network provided updated information to Media Bureau staff on Feb. 27, 2012.

<sup>192</sup> Among others, DIRECTV offers the following channels: World Harvest Television, C-SPAN 1 and 2, Daystar, Trinity Broadcasting Network, the WORD Network, BYU TV, LINK TV, NASA TV, TCT, Once Mexico, EWTN, HITN, NRB, MHz, V-Me, CTN, Gem Net, Hope Channel, JLTv, Enlace, Golden Eagle Broadcasting, Free Speech TV, GOD TV, and numerous local PBS channels. See DIRECTV 6/8/11 Comments at 13.

<sup>193</sup> 47 U.S.C. § 532(b).

<sup>194</sup> 47 U.S.C. § 532(a).

The Commission regulates the prices, terms, and conditions for access to these channels and reviews petitions for relief from aggrieved parties.<sup>195</sup>

70. Section 612 also provides that: (1) “at such time as cable systems with 36 or more activated channels are available to 70 percent of households within the United States” and (2) “are subscribed to by 70 percent of the households to which such systems are available, the Commission may promulgate any additional rules necessary to provide diversity of information sources.”<sup>196</sup> In previous reports, the Commission examined whether the “70-70 benchmark” had been met.<sup>197</sup> While the Commission did find in the *13<sup>th</sup> Report* that the first prong of the benchmark had been met, based on the data collected for that report, the Commission held it was less clear whether the second prong had been met.<sup>198</sup> Thus, the Commission, at that time, required cable operators to submit data to determine whether the 70-70 benchmark had been met.<sup>199</sup> In particular, the Commission stated that it would require each cable operator to submit certain information for each cable system on a zip code basis for 2006 and 2007.<sup>200</sup> To implement this new data collection requirement, the Media Bureau sought comment on a proposed new form.<sup>201</sup> Although the Commission did initiate the Office of Management and Budget (“OMB”) approval process for that form, it did not ultimately submit the matter to OMB.<sup>202</sup> We now find, using data that is currently available to us, that incumbent cable systems’ penetration (that is, the percentage of homes passed that subscribe to cable) is declining. Specifically, the 2010 data from the Annual Report of Cable Television Systems (FCC Form 325) indicate that incumbent cable systems pass well over 70 percent of households. The FCC Form 325 data, however, also indicate that only 45.3 percent of households passed by incumbent cable systems subscribe to these systems, compared to 56.3 percent reported in the *13<sup>th</sup> Report*.<sup>203</sup> Thus, we conclude that because the available data indicate that the second prong of the 70-70 benchmark is not met, it is not necessary to impose a new data collection

<sup>195</sup> 47 C.F.R. §§ 76.970-78. In 2008, the Commission released a Report and Order modifying the leased access rules. See *Leased Commercial Access*, MB Docket No. 07-42, Report and Order and Further Notice of Proposed Rulemaking, 23 FCC Rcd 2909 (2008). The Report and Order was stayed by the U.S. Court of Appeals for the Sixth Circuit. See *Order, United Church of Christ Office of Communications, Inc. v. FCC*, No. 08-3245 (6th Cir. 2008). The Report and Order included rule changes requiring approval by the Office of Management and Budget which was denied on July 9, 2008. No further action has been taken by the Commission to date and the rule changes remain in abeyance.

<sup>196</sup> 47 U.S.C. § 532(g). This provision was added to the Communications Act by the Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984).

<sup>197</sup> See, e.g., *13<sup>th</sup> Report*, 24 FCC Rcd at 557-61, ¶¶ 33-43; *12<sup>th</sup> Report*, 21 FCC Rcd at 2512-15, ¶¶ 31-36.

<sup>198</sup> See *13<sup>th</sup> Report*, 24 FCC Rcd 559-60, ¶¶ 40-41.

<sup>199</sup> See *id.* at 560-61, ¶ 43.

<sup>200</sup> Specifically, the *13<sup>th</sup> Report* identified the following information: (1) the total number of homes the cable operator currently passes; (2) the total number of homes the cable operator currently passes with 36 or more activated channels; (3) the total number of actual subscribers, including all subscribers in MDUs; and (4) the total number of subscribers with 36 or more activated channels. See *13<sup>th</sup> Report*, 24 FCC Rcd at 560-61, ¶ 43.

<sup>201</sup> See *Media Bureau Seeks Comment on a Cable Subscribership Survey for the Collection of Information Pursuant to Section 612(g) of the Communications Act*, MB Docket No. 07-269, Public Notice, 24 FCC Rcd 217 (MB 2009).

<sup>202</sup> See FCC, *Notice of Public Information Collection(s) Being Reviewed by the Federal Communications Commission, Comments Requested*, 74 Fed. Reg. 4437 (2009). Before formally submitting an information collection to OMB for approval, the Commission is required to seek comments on its proposal under the Paperwork Reduction Act of 1995, P.L. 104-13 (44 U.S.C. 3506(c)(4)).

<sup>203</sup> See also *infra*, ¶ 142 & Table 6 (showing a similar decline based on SNL Kagan data).

requirement on all cable operators regarding this subject. Accordingly, we will not require cable operators to provide the data requested in the 13<sup>th</sup> Report or pursue approval of this proposed reporting requirement.<sup>204</sup>

71. *Access to Multiple Dwelling Units.* At one time, competitive MVPDs faced difficulty obtaining access to multiple dwelling units (“MDUs”) due to long-term exclusive contracts between building owners and incumbent providers.<sup>205</sup> The Commission addressed this concern in 2007 by adopting rules to prevent the use of exclusive contracts for the provision of video services to MDUs and other centrally managed residential real estate developments.<sup>206</sup> In particular, the Commission prohibited the enforcement of existing exclusivity clauses and the execution of new ones by cable operators, common carriers, and OVSS.<sup>207</sup> The Commission found that exclusivity clauses were a barrier to both new entry into the MVPD marketplace and to broadband deployment, as well as an unfair act under Section 628(b).<sup>208</sup>

72. *Inside Wiring.* Pursuant to Section 624(i) of the Act, the Commission promulgated rules providing subscribers with the opportunity to purchase the wiring inside their homes after the termination of cable service and before the removal of such wiring.<sup>209</sup> The Commission later adopted rules which (1) provided for the sale, or transfer, of “home run” wiring in an MDU by an incumbent provider who is ceasing provision of service; (2) gave competitive MVPDs access to molding in an MDU that contains wiring of an incumbent provider for installation of the competitive MVPD’s inside wiring; and (3) gave subscribers access to existing inside wiring prior to the termination of service in order to avoid interruptions in service.<sup>210</sup> In 2007, the Commission issued a Report and Order and a Declaratory Ruling

<sup>204</sup> This decision does not affect the data collection requirements of FCC Form 325, to which cable operators remain subject.

<sup>205</sup> See, e.g., 13<sup>th</sup> Report, 24 FCC Rcd at 660-62, ¶¶ 250-54; 12<sup>th</sup> Report, 21 FCC Rcd at 2597, ¶¶ 207-08. These long-term exclusive contracts were especially harmful to competition given that 30 percent of Americans lived in MDUs in 2007, with that figure predicted to increase over time. See *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, MB Docket No. 07-51, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 20235, 20235-36, ¶ 1 (2007) (“MDU Order and FNPRM”), *aff’d sub nom. Nat’l Cable & Television Ass’n v. FCC*, 567 F.3d 659 (2009).

<sup>206</sup> See *MDU Order and FNPRM*, 22 FCC Rcd at 20235-36, 20238, ¶¶ 1-2, 7. See also 47 C.F.R. § 76.2000. In 2010, the Commission released a Second Report and Order building on its *MDU Order and FNPRM*. See *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, MB Docket No. 07-51, Second Report and Order, 25 FCC Rcd 2460 (2010). In this Second Report and Order, the Commission determined that MVPDs are permitted to use bulk billing arrangements – those arrangements in which one MVPD offers video service to every resident of an MVPD at a substantial discount than what each individual resident would pay if he or she contracted with the MVPD individually. See *id.* at 2463-71, ¶¶ 10-28. In addition, the Commission determined that MVPDs are allowed to enter exclusive marketing agreements with MDU owners. See *id.* at 2471-73, ¶¶ 29-37.

<sup>207</sup> See *MDU Order and FNPRM*, 22 FCC Rcd at 20251, ¶ 30.

<sup>208</sup> See *id.* at 20248-49, ¶¶ 26-27. The pending Further Notice of Proposed Rulemaking seeks comment on extending the MDU exclusivity ban to DBS providers, private cable operators, and other MVPDs not subject to Section 628. See *id.* at 20264, ¶¶ 61-62.

<sup>209</sup> 47 U.S.C. § 544(i); 47 C.F.R. §§ 76.801-02. See also *Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring*, MM Docket No. 92-260, Report and Order, 8 FCC Rcd 1435 (1993).

<sup>210</sup> 47 C.F.R. §§ 76.804-06. See also *Telecommunications Services Inside Wiring; Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring*, CS Docket No. 95-184; MM (continued....)

that classified inside wiring behind sheet rock as physically inaccessible given the significant cost and physical damage to accessing wiring behind sheet rock, thereby facilitating the transfer of the ownership of that wiring when an incumbent provider is ceasing service.<sup>211</sup>

73. *Over-the-Air Reception Devices.* Pursuant to the Act, the Commission has adopted a rule preempting restrictions that impair viewers from receiving video services using over-the-air reception devices (“OTARD”).<sup>212</sup> The rule applies to direct broadcast satellite antennas that are one meter or less in diameter, or any size in Alaska; antennas that are one meter or less in diameter or diagonal measurement and are designed to receive or transmit either video programming services through multipoint distribution services, including multichannel multipoint distribution services, instructional television fixed services, and local multipoint distribution services, or fixed wireless signals other than via satellite; and antennas designed to receive television broadcast signals.<sup>213</sup> For the rule to apply, the antenna must be installed “on property within the exclusive use or control of the antenna user where the user has a direct or indirect ownership or leasehold interest in the property.”<sup>214</sup> The rule prohibits restrictions impairing the installation, maintenance, or use of antennas to receive video programming on property within the exclusive control of the antenna user.<sup>215</sup> The rule bars restrictions that: (1) unreasonably delay or prevent installation, maintenance, or use; (2) unreasonably increase the cost of installation, maintenance, or use; and (3) preclude reception or transmission of an acceptable quality signal.<sup>216</sup> DBS operators maintain that continued enforcement of this rule is critical to ensuring their competitiveness in the video market.<sup>217</sup>

## (ii) Market Conditions Influencing Entry

74. In addition to regulatory conditions, a number of market conditions may also influence if, and when, entry occurs. Economies of scale, capital requirements, and the reaction of competitors to new entrants all affect a firm’s ability to enter into a market. Economies of scale appear to produce cost advantages, especially with respect to the cost of acquiring programming and consumer premise equipment,<sup>218</sup> and thus may play a major role in profitability and the willingness to enter the MVPD (Continued from previous page)

Docket No. 92-260, Report and Order and Second Further Notice of Proposed Rulemaking, 13 FCC Rcd 3659 (1997). “Home run” wiring is the wiring which runs from just outside an MDU resident’s unit back to that point where the provider’s wiring becomes devoted to that resident. 47 C.F.R. § 76.800(d).

<sup>211</sup> See *Telecommunications Services Inside Wiring Customer Premises Equipment; Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring; Clarification of the Commission’s Rules and Policies Regarding Unbundled Access to Incumbent Local Exchange Carriers’ Inside Wire Subloop*, CS Docket No. 95-184, MM Docket No. 92-260, WC Docket No. 01-338, Report and Order and Declaratory Ruling, 22 FCC Rcd 10640, 10646-61, ¶¶ 12-47 (2007), *aff’d sub nom. Nat’l Cable & Television Ass’n v. FCC*, No. 07-1356, 2008 WL 4808911 (D.C. Cir. Oct. 23, 2008).

<sup>212</sup> 47 U.S.C. § 303 note. See also *Telecommunications Act of 1996*, Pub. L. No. 104-04, § 207, 110 Stat. 56, 114 (1996) (“1996 Act”).

<sup>213</sup> 47 C.F.R. § 1.4000(a)(1)(i)-(iii).

<sup>214</sup> 47 C.F.R. § 1.4000(a)(1).

<sup>215</sup> *Id.* The antenna user must have a direct or indirect ownership interest, or leasehold interest, in the property. *Id.*

<sup>216</sup> 47 C.F.R. § 1.4000(a)(3).

<sup>217</sup> See *DISH Network 6/20/09 Reply at 9-10; DIRECTV 5/20/09 Comments at 23-24*. DIRECTV and DISH Network have petitioned the Commission for a declaratory ruling on the legitimacy of a Philadelphia ordinance restricting the placement of satellite dishes. See *Media Bureau Seeks Comment on Petition for Declaratory Ruling That An Ordinance of the City of Philadelphia, Pennsylvania is Preempted By The Commission’s Over-The-Air Reception Device Rule*, CSR-8541-O, Public Notice, 26 FCC Rcd 16074 (MB 2011).

<sup>218</sup> For a discussion of market-based conditions that influence entry, see Porter, *supra*, n. 19, at 7-17.



industry. Capital requirements, especially large fixed costs, and first-mover advantages, may also influence if and when MVPD entry takes place. The expected reaction from existing competitors, especially in terms of price competition, also influences entry.<sup>219</sup> Each of these elements is discussed in turn below.

75. *Economies of Scale.* The term “economies of scale” refers to the situation where there is a decline in unit costs as the total number of units per period increases. Economies of scale may deter entry if new MVPDs must enter the market at a large scale in order to obtain cost advantages similar to incumbent MVPDs.<sup>220</sup> Statements from MVPDs suggest that scale economies affect the cost of acquiring programming and consumer premise equipment, such as set-top boxes. In their reports to shareholders, some MVPDs emphasize the value of scale economies. For example, Comcast stressed the importance of achieving scale in both content and distribution in its transaction with NBC-Universal.<sup>221</sup> When discussing the rising cost of video programming, DIRECTV explained that the company would manage increasing costs of programming by continuing to use its considerable scale to leverage fair deals for programming at the negotiating table.<sup>222</sup> On the other hand, the American Cable Association (“ACA”) calls attention to the higher prices paid for video programming by small cable operators that lack scale economies.<sup>223</sup>

76. *Capital Requirements.* The need to invest large financial resources in order to compete may also influence MVPD entry, especially in a mature market where most customers wanting MVPD service already subscribe to an MVPD. Large fixed costs and an entrant’s recognition that most of its subscribers would need to switch from an incumbent MVPDs may delay the entrance of a new MVPD. For example, Verizon explained that it expected to invest \$23 billion from 2004 to 2010 deploying its FiOS network.<sup>224</sup>

77. *First Mover Advantages.* First mover advantages may represent another condition influencing entry.<sup>225</sup> Years of advertising and customer relationships may provide incumbents with a degree of brand identification and customer loyalty.<sup>226</sup> Entrants must often spend heavily to win customers from incumbents, which often involves start-up losses and takes an extended period of time.<sup>227</sup> Given the maturity of the MVPD market, new MVPDs recognize that they must win customers from incumbents.<sup>228</sup> If it costs more to get a subscriber to switch than it costs the incumbent to get the customer initially, this constitutes a first-mover advantage that deters entry.

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<sup>219</sup> *Id.* at 17-23.

<sup>220</sup> *Id.* at 7-9.

<sup>221</sup> Comcast, *2010 Annual Review*, Letter to Shareholders at 1.

<sup>222</sup> DIRECTV, *2010 Annual Report*, Message to Shareholders.

<sup>223</sup> ACA 7/29/09 Comments at 2, 11-12.

<sup>224</sup> Verizon 5/20/2009 Comments at 6.

<sup>225</sup> For a discussion of first-mover advantages, see David Montgomery & Marvin Lieberman, *First-Mover Advantages*, STRATEGIC MANAGEMENT JOURNAL, Summer 1988, at 41-58.

<sup>226</sup> Porter at 9.

<sup>227</sup> *Id.*

<sup>228</sup> DISH Network says that “as the pay-TV industry matures, we and our competitors increasingly must seek to attract a greater proportion of new subscribers from each other’s existing subscriber bases rather than from first-time purchasers of pay-TV services.” DISH Network 2010 Form 10-K at 42.

78. *Reaction from Existing Competitors.* A potential entrant's expectations regarding the reaction from incumbent MVPDs may influence entry. For instance, the possibility of "predatory pricing," where an incumbent lowers price in an effort to discourage entry or drive an entrant from the market before it can establish itself, may inhibit market entry.<sup>229</sup> Statements from analysts in the MVPD industry suggest, however, that incumbents and entrants prefer to avoid price wars and compete on other features of the MVPD service.<sup>230</sup>

**e. Recent Entry**

79. There are different types of entry in the MVPD market and each has a potentially different impact on competition in market for the delivery of video programming. Meaningful entry that substantially increases competition requires bringing new capacity, upgraded capacity, or efficiencies into the market with a desire to gain market share.<sup>231</sup> The deployment of video delivery systems by new MVPDs has had the most impact on competition in the MVPD market. The deployment of new video delivery systems by AT&T U-verse and Verizon FiOS are recent examples of this type of entry. Another type of entry involves the acquisition of an existing video delivery system followed by investment to upgrade the system. Although this type of entry does not, by itself, increase the number of competitors, investments to upgrade an existing video system contributes to a strengthening of competition by adding capacity and changing the technology to provide more channels and advanced video services, such as digital television, HD, VOD, and DVR. The acquisition of Adelphia by Comcast and Time Warner Cable in 2005 is an example of this type of entry.<sup>232</sup> Entry that involves buying an existing video system but not investing in new capacity or changing the way the company operates will have the least impact on competition. This type of entry does not increase the number of competitors or otherwise strengthen competition. The various types of entry highlight the view that it is investment in new capacity, upgrading existing capacity, or elevating efficiency that provides meaningful entry.

<sup>229</sup> For a discussion of predatory pricing, see, Patrick Bolton, Joseph F. Brodley & Michael H. Riordan, *Predatory Pricing: Strategic Theory and Legal Policy*, 88 GEO. L.J. 2239 (2000), <http://www0.gsb.columbia.edu/faculty/pbolton/PDFS/BBRPPrincetonDP.pdf> (visited Jan. 17, 2012).

<sup>230</sup> See, e.g., David Roisen, *Investor Concerns of Pay-TV Price Wars are Overblown, Say Analysts*, SNL Kagan, Oct. 16, 2008, <http://www.snl.com/interactivex/article.aspx?id=8538777&KPLT=6> (visited Jan. 17, 2012). In the article, Sanford C. Bernstein analyst Craig Moffett said, "I've been hearing about the probability of price wars in this sector forever and ever and ever," and Insight Research Corp. analyst and president Bob Rosenberg, said "Price wars are always possible, but it's not clear what the precipitating event would be . . .". Mr. Rosenberg expressed his belief that price is unlikely to become the main point of contention among pay-TV competitors anytime soon. See also, John Eggerton, *Whitacre Sees No Video Price War*, BROADCASTING & CABLE, June 2, 2006, [http://www.broadcastingcable.com/article/104399-Whitacre\\_Sees\\_No\\_Video\\_Price\\_War.php](http://www.broadcastingcable.com/article/104399-Whitacre_Sees_No_Video_Price_War.php) (visited Jan. 17, 2012). In the article, AT&T Chairman Edward Whitacre tried to assure Wall Street that "the entry of telcos into the video space would not lead to price cuts in video service." Mr. Whitacre said "I don't think there's going to be a price war. I think it's going to be a war of value and of services."

<sup>231</sup> Porter at 7.

<sup>232</sup> Comcast and Time Warner Cable claimed that they would upgrade Adelphia's systems to enable the delivery of new or improved advanced services and to speed and expand the rollout of advanced services that already have been introduced. 2006 *Adelphia, Comcast, Time Warner Cable MO&O*, 21 FCC Rcd at 8310-16, ¶¶ 246-262. Adelphia's cable systems are being upgraded but the process has taken longer than Comcast executives hoped, according to Marc Goodman, a Comcast spokesman. See Jon Chesto, *Comcast's Adelphia Conversion is Taking Longer than Expected to Complete*, THE PATRIOT LEDGER, Sept. 4, 2010, <http://blogs.wickedlocal.com/massmarkets/2010/09/04/comcasts-adelphia-conversion-is-taking-longer-than-expected-to-complete/#axzz1nc2ejUMN> (visited Feb. 27, 2012).

80. Since the last report, the deployment of MVPD systems by AT&T and Verizon had the most significant impact on competition in the MVPD market.<sup>233</sup> This type of entry, however, is rare when compared to the number of transactions involving the buying and selling of existing MVPD systems. Although most transactions do not change the number of competitors, some have resulted in MVPD system upgrades. In addition, a number of acquisitions stem from cable MVPD efforts to shed geographically disparate systems and grow regional clusters of systems.<sup>234</sup>

81. *Cable MVPD Transactions.* In previous reports, we have provided information regarding cable transactions.<sup>235</sup> Although the buying and selling of MVPD properties does not necessarily affect competition, transactions provide useful information regarding the value of different MVPD properties. According to SNL Kagan, cable mergers and acquisitions reveal that the marketplace places a premium on larger-sized cable systems, on systems with dense footprints, systems that have been upgraded, and systems with a high penetration of Internet access services.<sup>236</sup>

82. In 2006, cable merger and acquisition activity was the slowest since 1990. The cable systems sold in 2006 involved approximately 500,000 subscribers and the total value of the transactions was \$1.6 billion – only five percent of the 2005 total.<sup>237</sup> Most of the transactions in 2006 involved small rural cable systems.<sup>238</sup> These systems sold at prices that reflected 9.3 times cash flow and the average value per subscriber was \$2,794.<sup>239</sup>

83. The cable systems sold in 2010 involved approximately almost 1.6 million subscribers and the total value of the transactions was \$5.4 billion.<sup>240</sup> Merger and acquisitions among smaller rural cable systems continued to make up the majority of the transactions in 2010.<sup>241</sup> Almost two-thirds of these transactions involved cable systems with fewer than 5,000 subscribers and these systems sold at an average price of \$1,762 per subscriber, which was down from 2006 but up from the 2009 low of \$635.<sup>242</sup> Transactions involving cable systems with 5,000 to 10,000 subscribers sold at an average price of \$2,538 per subscriber, transactions involving systems with 50,000 to 100,000 subscribers sold at an average price of \$3,068 per subscriber, and transactions involving systems with 100,000 to 500,000 subscribers sold at an average price of \$3,904 per subscriber.

<sup>233</sup> SNL Kagan, *Cable TV Investor: Deals & Finance*, Oct. 31, 2011, at 7-8.

<sup>234</sup> SNL Kagan, *Broadband Cable Financial Databook*, 2011 Edition at 91.

<sup>235</sup> See, e.g., *13<sup>th</sup> Report*, 24 FCC Rcd at 565-66, ¶ 49 & Table 6.

<sup>236</sup> For example, SNL Kagan data show that, over the 10-year period from 2000 to 2010, cable transactions for systems with fewer than 100,000 subscribers sold for prices that reflect 8.9 to 9.9 times cash flow while cable transactions for systems larger than 100,000 subscribers sold for prices that reflect 12.6 to 15 times cash flow. Similarly, the average value per subscriber for systems with fewer than 100,000 subscribers ranged from \$1,700 to \$2,800 while the average value per subscriber for systems with between 100,000 and 500,000 subscribers averaged \$3,842 and the average value per subscriber for systems with over 500,000 averaged \$4,214. SNL Kagan, *Broadband Cable Financial Databook*, 2011 Edition, at 91.

<sup>237</sup> SNL Kagan, *Broadband Cable Financial Databook*, 2007 Edition, at 150.

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> SNL Kagan, *Broadband Cable Financial Databook*, 2011 Edition, at 91.

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

84. SNL Kagan explains that there has been a steady increase in cable system values as cable MVPDs have transitioned from video services to a combination of video, Internet, and telephone services, which provide a diversified revenue stream and higher revenue per subscriber.<sup>243</sup> Other SNL Kagan data, however, show that the average price per subscriber in all cable MVPD mergers and acquisitions has been erratic.<sup>244</sup> One explanation for the variance in the average price per subscriber is that the metric is sensitive to the inclusion or the absence of mergers and acquisitions of large cable systems. Stated differently, in years where no large cable systems are traded, the average price per subscriber reflects the value of smaller cable systems. And in years where large cable systems are traded, the average price per subscriber reflects the value of large systems. In short, the buying and selling of large cable systems in any given year heavily influences the average price per subscriber and, as noted above, large cable systems trade at a premium, relative to small cable systems.

### 3. MVPD Conduct

85. In addition to industry structure, a second key element of our analysis of MVPD competition is an examination of the conduct of MVPDs – in particular, the business models and competitive strategies of MVPDs. MVPDs choose from a variety of business models and competitive strategies to attract and retain subscribers and generate profits. In this section of the Report, we discuss MVPD competition in terms of both price and non-price rivalry. We then provide an overview of the current business models and competitive strategies of a sample of MVPDs.

#### a. Price Rivalry

86. Pricing represents one component of every MVPDs' competitive strategy. Some MVPDs market themselves as "premium" services while others market themselves as "value" services. In recent years, MVPDs have offered low introductory or promotional prices for delivered video services or bundles of video, Internet access, and voice services to attract new subscribers. Over time, MVPDs have altered their pricing in response to changes in the competitive landscape. For example, with a maturing MVPD market, some of the largest MVPDs have begun experimenting with both higher-priced and lower-priced video packages.<sup>245</sup>

87. Today, the largest and most mid-sized MVPDs offer one or more high-end pricing plans that include hundreds of channels and a complement of HD, DVR, VOD services, and some mix of premium channels. In addition, these MVPDs offer one or more mid-priced video service plan that includes fewer channels and a smaller complement of video services. MVPDs offer, but are less likely to market, lower-priced video service plans with fewer channels and few, if any, additional video services.<sup>246</sup> An MVPD may charge different prices in the different cities and towns it serves. These differences may reflect system upgrades or differences in the number of channels or advanced video services offered from one city to the next. They also may reflect differences in the number of competitors or differences in the competitive strategies used by competitors from one city to the next.

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<sup>243</sup> SNL Kagan, *Broadband Cable Financial Databook*, 2007 Edition, at 150.

<sup>244</sup> The average price per subscriber for all cable merger and acquisition activity was \$2,811 in 2006, \$3,378 in 2007, \$1,593 in 2008, \$1,981 in 2009, and \$3,451 in 2010. SNL Kagan, *Broadband Cable Financial Databook*, 2011 Edition at 93.

<sup>245</sup> Time Warner Cable in 2010 began targeting higher-end demographics with an enhanced bundle of video, Internet access, and telephone services; and a video-only service targeting budget-conscious homes. Time Warner Cable, *SEC Form 10-K for the Year Ended December 31, 2010*, at 6 ("Time Warner Cable 2010 Form 10-K").

<sup>246</sup> Marketing includes the information prominently displayed on the MVPD's website. Our review of the websites of a number of MVPDs suggests that it is often much easier to find the higher-priced video service plans than it is to find the lowest price video service plan offered by the MVPD.

88. *Discounts for New Subscribers.* One of the most common pricing strategies among MVPDs takes the form of discounts for new subscribers. For example, DISH Network explains that it often offers free programming and/or promotional pricing during introductory periods for new subscribers.<sup>247</sup> Typically, these new subscriber discounts are for a limited time (e.g., six months or a year) and often include additional video services (e.g., premium channels) or bundles of video, Internet access, and telephone service. At the end of introductory period, promotional materials usually indicate that prices will rise to the “normal” price. Similarly, DIRECTV offers five video packages ranging from \$29.99 per month to \$89.99 per month for 12 months after rebate with a 24-month agreement.<sup>248</sup> According to DIRECTV, the offer is available only to new customers and represents a savings of \$35 per month for the first year and \$20 per month in the second year.<sup>249</sup> A promotion by Verizon offers FiOS TV Prime HD, Internet (15/5 Mbps), and unlimited calling for \$89.99 per month with a two-year contract.<sup>250</sup> According to Verizon, the offer is available only to new customers and represents a savings of \$600 over the two-year period.<sup>251</sup> Cox offers new customers who order online a bundle of video, Internet access, and telephone services for \$90 per month for 12 months.<sup>252</sup> The offer is available only to new customers and the regular price of \$147.97 per month applies after the 12 month promotional period. According to Cox, this offer represents a first-year savings of \$695.64. The above examples are snapshots and may not reflect current service offerings and prices available to new subscribers. MVPD advertisements typically state that prices rise at the end of the promotional period. For example, a Cox advertisement offers new customers a video service for \$39 for six months. The advertisement states, “After six months, then current rates apply.”<sup>253</sup> Although cable MVPDs show their current rates and prices, some existing subscribers may be paying less than those shown. In statements to shareholders, DISH Network states that it has incurred significant costs to retain existing customers, mostly by upgrading their equipment to HD and DVR receivers.<sup>254</sup> In certain circumstances, DISH Network also has offered free programming and/or promotional pricing for limited periods for existing customers in exchange for a contractual commitment.<sup>255</sup>

#### b. Non-Price Rivalry

89. Central to every MVPD business model is its selection of the technology the company will use to deliver video programming. As described below, in the MVPD industry, the primary technologies available are coaxial cable, spectrum, and most recently xDSL and fiber. Within these parameters MVPDs have adopted various competitive strategies that include transition to digital service,

<sup>247</sup> DISH Network 2010 Form 10-K at 4.

<sup>248</sup> DIRECTV, [http://www.directv.com/DTVAPP/new\\_customer/base\\_packages.jsp?footernavtype=-1](http://www.directv.com/DTVAPP/new_customer/base_packages.jsp?footernavtype=-1) (visited Feb. 10, 2012).

<sup>249</sup> *Id.*

<sup>250</sup> Verizon, [http://program.verizon.com/offers/mlp.aspx?pattern=fiosTv\\_Triple&CMP=KNC-CON\\_Z\\_ZZ\\_FT\\_Z\\_Z\\_R\\_Z353&bkw=verizon+fios+and+tv&se=Bing&009=e&004=383370664&005=9618581188&011=verizon+fios+tv&006=1059372363&002=2181541](http://program.verizon.com/offers/mlp.aspx?pattern=fiosTv_Triple&CMP=KNC-CON_Z_ZZ_FT_Z_Z_R_Z353&bkw=verizon+fios+and+tv&se=Bing&009=e&004=383370664&005=9618581188&011=verizon+fios+tv&006=1059372363&002=2181541) (visited Feb. 10, 2012).

<sup>251</sup> *Id.*

<sup>252</sup> Cox, [https://secure.cox.com/Service/Store/OrderNow.aspx?campcode=tile-bundle\\_1\\_browse](https://secure.cox.com/Service/Store/OrderNow.aspx?campcode=tile-bundle_1_browse) (visited Feb. 10, 2012).

<sup>253</sup> Cox, [http://ww2.cox.com/residential/northernvirginia/pricing-and-special-offers/tv-deal.cox?campcode=rl\\_tv\\_tv\\_tv-deal\\_splash\\_010312\\_btn\\_nva\\_1#promo-terms](http://ww2.cox.com/residential/northernvirginia/pricing-and-special-offers/tv-deal.cox?campcode=rl_tv_tv_tv-deal_splash_010312_btn_nva_1#promo-terms) (visited Feb. 26, 2012).

<sup>254</sup> DISH Network 2010 Form 10-K at 4.

<sup>255</sup> *Id.* Data on DISH Network’s free programming or promotional prices for existing customers is not available.

product differentiation, delivery of video to diverse geographic locations, delivery of video to a variety of in-home or mobile devices, and implementation of marketing tactics.

90. Each specific technology has its own set of incumbent advantages and disadvantages. Moreover, technologies change over time and the competitive advantages of one technology may fade as new technologies are introduced. Originally, the MVPD market was defined by coaxial cable. When DIRECTV and DISH Network began offering MVPD service in the 1990s, the digital DBS systems provided significantly greater channel capacity compared to existing analog cable systems.<sup>256</sup> Cable MVPDs responded to DBS's technology lead by upgrading their cable systems.<sup>257</sup> These upgrades included incorporating more optic fiber into their coaxial network and transitioning from analog to digital technology.<sup>258</sup> More recently, Verizon built a fiber-to-the-home system and transitioned to all digital technology.<sup>259</sup> DBS technology continues to successfully deliver linear video programming, but the DBS MVPDs acknowledge that their systems cannot deliver VOD services and other two-way services like Internet access and telephone services that play an ever larger role in the business models of MVPDs.<sup>260</sup>

91. As a significant competitive strategy, cable MVPDs are replacing their analog video services and transitioning to all-digital video services. Comcast, for example, has been reclaiming bandwidth from analog video services to deliver more digital channels and more HD channels. By June 2011, Comcast had transitioned its expanded basic tier analog channels to digital in 85 percent of its footprint.<sup>261</sup> Subscribers with analog televisions use a set-top box with a digital terminal adapter to convert digital signals to analog signals.

92. Some cable operators are implementing another competitive strategy, the deployment of switched digital video ("SDV") as a solution for near-term capacity concerns.<sup>262</sup> Rather than broadcasting all available channels to viewers at once, SDV combines the bandwidth efficiencies of compressed digital content with switching to enable content to be streamed to viewers only upon request.<sup>263</sup> Time Warner Cable explains that this technology expands network capacity by transmitting only those digital video channels that are being watched within a given grouping of homes at any given moment.<sup>264</sup> According to Time Warner Cable, it is unlikely that all channels are being watched at all times within a given group of

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<sup>256</sup> NCTA 6/8/11 Comments at 3.

<sup>257</sup> *Id.*

<sup>258</sup> *Id.* at 3-4.

<sup>259</sup> Verizon began offering FiOS services using both analog and digital technologies but transitioned to all-digital technology in 2008. Verizon 5/20/09 Comments at 7.

<sup>260</sup> DIRECTV discusses the risk factors associated with competing in the MVPD industry against cable and telephone MVPDs and other land-based systems that have the ability to offer video, Internet, telephone, and other two-way services. DIRECTV 2010 Form 10-K at 17. DIRECTV and DISH Network have cooperative arrangements with telephone and broadband companies to provide Internet access and telephone service. These arrangements, however, are typically with telephone and broadband companies that do not offer video services in the same geographic area. For example, DIRECTV typically has cooperative arrangements with Verizon to provide Internet access and telephone service where Verizon offers DSL and not in areas where Verizon offers FiOS TV. Verizon, <http://www22.verizon.com/home/directv/#packages> (visited Feb. 26, 2012).

<sup>261</sup> Although the expanded basic tier is being converted from analog to digital, the basic tier remains analog. Comcast 6/8/11 Comments at 9, 17.

<sup>262</sup> NCTA 5/20/09 Comments at 37.

<sup>263</sup> Cox 8/28/09 Reply at 12.

<sup>264</sup> *Id.*

homes, so SDV technology can free up capacity for other uses, including additional channels, more VOD offerings, and faster Internet connections.<sup>265</sup> The cable industry and TiVo collaborated in the development of a tuning adaptor to enable the two-way tuning of switched digital video signals for a “one-way” TiVo device.<sup>266</sup>

93. Industry sources predict that SDV may pass 90 million homes by the end of 2012.<sup>267</sup> Time Warner Cable has deployed switched digital video in all of its service areas<sup>268</sup> and BrightHouse has deployed SDV across some of their systems.<sup>269</sup> SDV was available in 68 percent of Charter’s footprint as of June 2011.<sup>270</sup> The Commission has required cable operators to support SDV reception on retail devices.<sup>271</sup> In Northern Virginia, Cox has implemented SDV technology adding 24 new high-definition channels and 27 additional standard-definition channels.<sup>272</sup> Comcast, however, has conducted some tests but recently decided to put further SDV deployments on hold.<sup>273</sup>

<sup>265</sup> *Id.*

<sup>266</sup> NCTA 8/28/09 Reply at 12-14.

<sup>267</sup> Jeff Baumgartner, *Cable SDV Makes Bid for a Tech Renaissance*, LR Cable News Analysis, Oct. 12, 2010, [http://www.lightreading.com/document.asp?doc\\_id=198361&site=lr\\_cable](http://www.lightreading.com/document.asp?doc_id=198361&site=lr_cable) (visited Oct. 25, 2011).

<sup>268</sup> BigBand Networks, *BigBand’s SDV Reaches More than 39 Million Households* (press release), May 18, 2011.

<sup>269</sup> Time Warner Cable 2010 Form 10-K at 2.

<sup>270</sup> *Charter Loses More Video Subs, Widens Loss in Q2*, CED NEWS, Aug. 2, 2011, <http://www.cedmagazine.com/news/2011/08/charter-loses-more-video-subs,-widens-loss-in-q2> (visited Nov. 10, 2011).

<sup>271</sup> See *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices; Compatibility Between Cable Systems and Consumer Electronics Equipment; Oceanic Time Warner Cable, A subsidiary of Time Warner Cable, Inc.; Oceanic Time Warner Cable, a division of Time Warner Cable, Inc. Oceanic Kauai Cable System; Oceanic Time Warner Cable, a division of Time Warner Cable, Inc. Oceanic Oahu Central Cable System; Cox Communications, Inc. Fairfax County, Virginia Cable System; Cable One, Inc.’s Request for Waiver of Section 76.1204(a)(1) of the Commission’s Rules*, CS Docket No. 97-80; PP Docket No. 00-67; File Nos. EB-07-SE-351, EB-07-SE-352; NAL/Acct. Nos. 200832100074, 200932100001, 200932100002, 200932100003, 200932100008, 200932100022, and 200932100023; FRN Nos. 0018049841, 0016034050; CSR-8080-Z, Third Report and Order and Order on Reconsideration, 25 FCC Rcd 14657, 14665-66, ¶¶ 14-15 (2010) (“*Navigation Devices Third Report and Order*”). Early issues centered on compatibility with third-party, unidirectional CableCARD devices needed to perform the signaling required to enable SDV. NCTA 8/28/09 Reply at 12-14. In June 2009, the Commission vacated Notices of Liability relating to Time Warner’s and Cox’s SDV implementation of programming previously delivered using CableCARD equipped unidirectional digital cable products (UDCPs). See *Oceanic Time Warner Cable, A subsidiary of Time Warner Cable, Inc.; Oceanic Time Warner Cable, a division of Time Warner Cable, Inc. Oceanic Kauai Cable System; Oceanic Time Warner Cable, a division of Time Warner Cable, Inc. Oceanic Oahu Central Cable System; Cox Communications, Inc. Fairfax County, Virginia Cable System*, File Nos. EB-07-SE-351, EB-07-SE-352; NAL/Acct. Nos. 200832100074, 200932100001, 200932100002, 200932100003, 200932100008, 200932100022, and 200932100023; FRN Nos. 0018049841, 0016034050; Order on Review, 24 FCC Rcd 8716 (2009) (vacating forfeiture orders).

<sup>272</sup> Cox 8/28/09 Reply at 12-13.

<sup>273</sup> Jeff Baumgartner, *Comcast Back-Burners SDV (Again)*, LIGHT READING CABLE, Feb. 1, 2011, [http://www.lightreading.com/document.asp?doc\\_id=203902&site=lr\\_cable](http://www.lightreading.com/document.asp?doc_id=203902&site=lr_cable) (visited Jan. 15, 2012). Comcast did not elaborate on its reasons or what other bandwidth management technologies it may be considering. *Id.*

94. Corporate annual reports suggest that product differentiation has been, and remains, a key factor for competing in the market for delivered video programming.<sup>274</sup> For instance, an MVPD might offer a unique video product that a rival MVPD cannot or does not provide. DIRECTV offers the NFL Sunday Ticket where subscribers can watch every out-of-market professional football game in HD. In its advertising, DIRECTV states that, “You won’t find anything like it with DISH Network or cable ... It’s available only on DIRECTV.”<sup>275</sup> Some MVPDs highlight better-value or low-price video packages. DISH Network maintains that it offers better value, and claims that, “DIRECTV can’t compare with DISH Network’s everyday low price.”<sup>276</sup> Argent Communications, a cable operator in New Hampshire with 2,500 subscribers, highlights cable at “affordable rates” with lifeline and basic video service listed before higher-priced digital video service.<sup>277</sup> Commonly, an MVPD claims to offer more channels or more channels of a specific type than its rivals. For example, DIRECTV claims to offer the most full-time HD channels.<sup>278</sup> Verizon, on the other hand, claims that FiOS TV offers more children’s, sports, and premium movie channels than cable.<sup>279</sup> MVPDs further attempt to differentiate their products by claiming their products have superior quality. For example, Verizon FiOS claims that it offers brilliant HD picture quality in almost any kind of weather: “Simply put, it’s the best HDTV experience you can get.”<sup>280</sup> Some MVPDs highlight bundles of video, Internet access, and telephone services while other MVPDs focus their marketing on video packages. The two DBS MVPDs focus their marketing on video services, in part, because the satellite technology they use for delivering video programming limits their ability to provide non-video (*i.e.*, Internet and telephone) services. The major cable and telephone MVPDs focus their marketing on bundled video, Internet access, and telephone. Their emphasis usually is that bundles offer better prices for consumers, relative to individual service offerings.

95. Another component of a MVPD’s business model is the choice of where the company will offer delivered video programming. The two DBS MVPDs offer delivered video programming nationwide.<sup>281</sup> In contrast, cable and telephone MVPDs vary widely in the geographic areas and populations covered by their systems. Some offer delivered video programming in multiple states and multiple large cities. For example, at the end of 2010, Verizon offered FiOS video services to approximately 60 percent of its wireline footprint.<sup>282</sup> Other MVPDs specialize in a region of the country

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<sup>274</sup> MVPDs typically refer to the importance of product differentiation in their business strategies. *See, e.g.*, DIRECTV 2010 Form 10-K at 4; DISH Network 2010 Form 10-K at 1.

<sup>275</sup> DIRECTV, <http://www.directv.com/DTVAPP/content/sports/nfl?footernavtype=-1&lpos=header> (visited Oct. 24, 2011).

<sup>276</sup> DISH Network, <http://www.dishnetwork.com/compare/> (visited Oct. 24, 2011).

<sup>277</sup> Argent Communications, <http://www.argentcommunications.com/> (visited Oct. 24, 2011).

<sup>278</sup> DIRECTV, <http://www.directv.com/DTVAPP/content/directv/programming> (visited Oct. 24, 2011).

<sup>279</sup> Verizon, <http://www22.verizon.com/home/fiostv/> (visited Jan. 15, 2012).

<sup>280</sup> Verizon, <http://www22.verizon.com/Residential/FiOSTV/Overview.htm#features> (visited Oct. 26, 2011).

<sup>281</sup> DIRECTV explains that it provides the same programming packages, at the same rates, in Alaska and Hawaii as it provides in the contiguous 48 states. However, subscribers in Alaska and Hawaii must use slightly larger dishes than customers in the contiguous 48 states. DIRECTV 6/8/2011 Comments at 13-14. DISH Network offers local broadcast stations in all 210 markets, including Alaska and Hawaii. DISH Network 7/29/2009 Comments at 6; DISH Network 6/8/2011 Comments at 2. *See also* DishNow, <http://www.dishnow.com/alaska.html>; <http://www.dishnow.com/hawaii.html> (visited Mar. 14, 2012).

<sup>282</sup> Verizon 6/8/11 Comments at 6. According to the company’s FCC Form 477 for December 31, 2010, Verizon’s wireline footprint includes households in 13 states and the District of Columbia.



or an even smaller geographic area. For example, BendBroadband, a cable MVPD, provides delivered video programming to 12 communities in Central Oregon.<sup>283</sup>

96. One of the newest forms of product differentiation is known as the “TV Everywhere” initiative, which allows consumers to access both linear video programming and VOD programs on a variety of in-home and mobile Internet-connected devices. At its inception, TV Everywhere embodied the MVPD industry’s attempt to compete with online video offered by others.<sup>284</sup> TV Everywhere is evolving, however, into a competitive strategy that MVPDs use to differentiate themselves from their rivals.<sup>285</sup> Some MVPDs, such as Comcast, Cox, and AT&T, permit non-subscribers to access a subset of video content online. Other MVPDs, such as Time Warner Cable and Verizon, permit only their MVPD subscribers to access their TV Everywhere content.<sup>286</sup> Both DBS MVPDs also have TV Everywhere strategies. In 2010, DIRECTV began offering the “NFL Sunday Ticket To-Go” for the first time on the iPad.<sup>287</sup> TV Everywhere is new, and the amount of MVPD content available and the number of devices that can receive TV Everywhere content are rapidly increasing.<sup>288</sup> For example, some MVPDs recently began offering streaming of live programs to iPads while devices are in subscribers’ homes.<sup>289</sup>

97. VOD and DVR services represent another noticeable difference in the marketing of MVPDs. With respect to VOD, some highlight thousands of VOD movies and television shows in their libraries while others simply mention that they offer VOD. With respect to DVR service, some MVPDs call attention to their whole-home DVR, which allows subscribers to view recorded video programs on multiple televisions throughout a house. For example, AT&T U-verse offers a DVR that can record up to 65 hours of HD content, record and play back programs from any room, pause a recorded show in one room and pick it up in another, and can be programmed remotely from a computer or wireless phone.<sup>290</sup> Time Warner Cable offers a DVR that enables subscribers to restart a program already in progress.<sup>291</sup> Cablevision offers a DVR service that enables subscribers to record programs that are stored on Cablevision’s servers instead of storing the programs on the hard drive within the DVR cable box.<sup>292</sup>

98. The language an MVPD uses to market its delivered video programming suggests the identity of the other MVPDs it perceives to be its closest rivals. For example, in its marketing, DIRECTV

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<sup>283</sup> BendBroadband, [http://www.bendbroadband.com/residential/abb\\_company\\_info.asp?pageID=abbb&subID=aci](http://www.bendbroadband.com/residential/abb_company_info.asp?pageID=abbb&subID=aci) (visited Nov. 2, 2011).

<sup>284</sup> SNL Kagan, *Cable TV Investor: Deals & Finance*, Oct. 31, 2011, at 3 & 5.

<sup>285</sup> *Id.* at 5.

<sup>286</sup> MVPDs that wish to restrict access to their online TV Everywhere video programming use an authentication process that requires MVPD subscribers to provide a user ID and password.

<sup>287</sup> DIRECTV, *2010 Annual Report*, Message to Shareholders.

<sup>288</sup> SNL Kagan, *Cable TV Investor: Deals & Finance*, Oct. 31, 2011, at 3-6.

<sup>289</sup> See, e.g., DIRECTV, [http://www.directv.com/DTVAPP/content/technology/mobile\\_apps/ipad](http://www.directv.com/DTVAPP/content/technology/mobile_apps/ipad) (visited Mar. 2, 2012); Cablevision, [http://optimum.custhelp.com/app/answers/detail/a\\_id/2694/kw/ipad%20streaming](http://optimum.custhelp.com/app/answers/detail/a_id/2694/kw/ipad%20streaming) (visited Mar. 2, 2012).

<sup>290</sup> AT&T, <http://www.att.com/shop/tv/#fbid=h2tVPdbUKLw> (visited Jan. 20, 2012).

<sup>291</sup> Time Warner Cable, <http://www.timewarnercable.com/nynj/learn/cable/startover.html> (visited Mar. 2, 2012).

<sup>292</sup> Cablevision, [http://optimum.custhelp.com/app/answers/detail/a\\_id/2580/kw/DVR%20Plus/session/L3RpbWUvMTMzMDCwODYzMC9zaWQvZ0xFOzE1U2s%3D](http://optimum.custhelp.com/app/answers/detail/a_id/2580/kw/DVR%20Plus/session/L3RpbWUvMTMzMDCwODYzMC9zaWQvZ0xFOzE1U2s%3D) (visited Mar. 2, 2012).

often names DISH Network and contrasts its video services to those offered by DISH Network.<sup>293</sup> Similarly, DISH Network often compares its services with those offered by DIRECTV.<sup>294</sup> Verizon FiOS and AT&T U-verse, on the other hand, tend to compare themselves to cable MVPDs, perhaps because they consider their bundle offerings as more similar to those offered by cable MVPDs and less similar to the bundles offered by DBS MVPDs.<sup>295</sup>

99. Consumers need information to make informed choices regarding MVPD services and MVPD providers. To provide this information, MVPDs use print, radio, television, and Internet media to motivate new and existing customers to call the MVPD, visit the MVPD's website, or contact independent third party retailers.<sup>296</sup> Some MVPDs also use telemarketing and door-to-door sales.<sup>297</sup> Customers looking to switch MVPD providers or purchase MVPD service for the first time receive and obtain information on services and promotional prices during introductory periods.<sup>298</sup> Existing customers looking to change their services, but not necessarily their MVPD provider, receive and obtain information on upgrading HD and DVR receivers, free programming, and promotional prices for existing customers, possibly in exchange for a contractual commitment.<sup>299</sup> Some MVPDs seek to retain subscribers that move to a new location by offering free installation of equipment at the new address.<sup>300</sup>

100. Because subscribers of MVPD services watch video programming daily and for many years, they value customer service. MVPDs recognize the importance of customer service as a critical component in customer acquisition and retention and explain their investment and efforts to improve customer service in communications with shareholders. For example, DIRECTV has 36 customer service centers that employ 17,000 customer service representatives.<sup>301</sup> Time Warner Cable explains that it continues to upgrade its customer care processes and infrastructure.<sup>302</sup> Time Warner Cable is upgrading its call center platforms and utilizing online approaches to give customers another alternative for engaging with the company.<sup>303</sup> As another example, Charter explains that its strategy for customer retention is to enhance the customer experience by providing customer care, making it easier for customers to use Charter's service, and exceeding customer expectations.<sup>304</sup> Periodic surveys of MVPD subscribers by

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<sup>293</sup> DIRECTV, <http://www.directv.com/DTVAPP/content/directv/directv-vs-dish-network> (visited Jan. 20, 2012).

<sup>294</sup> DISH Network, [http://www.dishnetwork.com/compare/index.aspx?WT.ac=ACQ\\_MKTG\\_DISH\\_STATIC\\_0112\\_getMoreForLess](http://www.dishnetwork.com/compare/index.aspx?WT.ac=ACQ_MKTG_DISH_STATIC_0112_getMoreForLess) (visited Jan 25, 2012).

<sup>295</sup> Verizon FiOS has mailed marketing materials containing messages such as: "Say good-bye to the cable company"; "FiOS vs. Cable or should we say the future vs. the past"; and "You're paying all that for cable and not getting all this?"

<sup>296</sup> See, e.g., DISH Network 2010 Form 10-K at 4; Time Warner Cable 2010 Form 10-K at 6.

<sup>297</sup> See, e.g., Time Warner Cable 2010 Form 10-K at 6.

<sup>298</sup> *Id.*

<sup>299</sup> *Id.*

<sup>300</sup> See, e.g., DIRECTV 2010 Form 10-K at 39.

<sup>301</sup> DIRECTV 2010 Form 10-K at 7.

<sup>302</sup> Time Warner Cable 2010 Form 10-K at 6.

<sup>303</sup> *Id.*

<sup>304</sup> Charter Communications, 2010 Annual Report, Letter to Shareholders at 4.

Consumer Reports and others provide information on which MVPDs are doing well meeting consumer expectations.<sup>305</sup>

101. Customer satisfaction can be influenced by more than products, prices, and customer service. For example, Comcast maintains that upgrading to an all-digital platform has enhanced its reputation for technical innovation.<sup>306</sup> Comcast explains that this reputation, as well as the recent rebranding of products as Xfinity, has driven improved perceptions and customer satisfaction.<sup>307</sup> Similarly, in 2010, Time Warner Cable refreshed its logo “to better convey the image of an innovative, dynamic company.”<sup>308</sup> Time Warner Cable maintains that its name and logo “carry tremendous brand equity and high consumer recognition.”<sup>309</sup>

**c. Business Models and Competitive Strategies of Select MVPDs**

102. The MVPD group is comprised of 1,157 cable MVPDs, two DBS MVPDs, two large telephone MVPDs and many smaller telephone MVPDs.<sup>310</sup> Although each MVPD has its own business model and competitive strategy, there may be some similarities within types of MVPDs. Below, we provide an overview of the business models and competitive strategies focusing on the two largest cable MVPDs (Comcast and Time Warner Cable) and a few selected mid-sized and smaller cable MVPDs (Buckeye Cable System, BendBroadband, Adams Cable Service, Sweetwater Cable). We also provide an overview of the business models and competitive strategies of the two DBS MVPDs (DIRECTV and DISH Network). Finally, we provide an overview of the business models and competitive strategies of the two largest telephone MVPDs (AT&T and Verizon) and a new telephone MVPD (CenturyLink).

**(i) Cable MVPD Business Models and Competitive Strategies**

103. Pursuant to statutory requirements, cable operators offer a basic service tier that includes broadcast television signals, PEG channels, and a few other national, regional, or local video programming services.<sup>311</sup> Cable MVPDs also offer one or more cable programming service tiers which include additional national, regional, and local cable entertainment, news and other networks, such as CNN, USA, and ESPN. In addition to providing an analog tier, cable operators also offer a digital tier or digital tiers, which enable digital video subscribers to receive additional cable networks. Some cable MVPDs are all digital and no longer offer an analog tier. Cable MVPDs also offer genre-based programming tiers, such as a movie tier or a sports tier, and premium services, such as HBO and Showtime.

104. *Large Incumbent Cable MVPDs.* In this category, we focus primarily on the business models and competitive strategies of the two largest cable MVPDs: Comcast and Time Warner Cable. Comcast is the largest cable MVPD and the largest MVPD, with 22.8 million video subscribers clustered in the mid-Atlantic, Chicago, Denver, and Northern California. Comcast has ownership interests in

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<sup>305</sup> See, e.g., DSL Reports, <http://www.dslreports.com/shownews/Consumer-Reports-FiOS-UVerse-Tops-113561> (visited Mar. 2, 2012).

<sup>306</sup> Comcast, *2010 Annual Review*, Letter to Shareholders at 2.

<sup>307</sup> *Id.*

<sup>308</sup> Time Warner Cable, *2010 Annual Report*, Letter to Shareholders at 2.

<sup>309</sup> *Id.*

<sup>310</sup> See *supra*, ¶¶ 18, 28 & n. 33.

<sup>311</sup> 47 U.S.C. § 543(b)(7).

approximately one out of every seven channels carried on its cable systems.<sup>312</sup> Comcast has interests in numerous national networks including E!, Golf Channel, Versus, Style, G4, A&E, Bravo, Chiller, CNBC, MSNBC, Oxygen, Sleuth, SyFy, and The Weather Channel.<sup>313</sup> Comcast also has ownership interests in numerous regional sports networks (“RSNs”).<sup>314</sup> In addition Comcast has ownership interests in the NBC network and its owned and operated (“O&O”) NBC affiliated local television stations, the Telemundo network and its O&O Telemundo affiliated local television stations, and Universal Pictures.<sup>315</sup>

105. Time Warner Cable is the second largest cable MVPD and the fourth largest MVPD, with over 12 million video subscribers clustered in five geographic areas – New York State (including New York City), the Carolinas, Ohio, Southern California (including Los Angeles), and Texas.<sup>316</sup> Time Warner Cable has ownership interests in national networks including MLB, MLS Direct Kick, NBA League Pass, NHL Center Ice, and Team HD, and numerous regional news networks and RSNs.<sup>317</sup>

106. *Programming Tiers.* Comcast video services range from a limited basic package with 20 to 40 channels of linear programming to digital packages that may include over 300 linear channels and more than 100 HD channels.<sup>318</sup> Similarly, Time Warner Cable offers hundreds of video channels and HD channels throughout its footprint.<sup>319</sup>

107. *Technology and Advanced Video Services.* Comcast and Time Warner Cable use a hybrid fiber optic and coaxial network that provides at least 750 MHz capacity and two-way transmission, which is essential to providing interactive services like VOD, Internet access, and telephone.<sup>320</sup> Comcast offers more than 25,000 VOD titles with approximately 6,000 VOD HD titles each month and a 3D channel that aggregates 3D movies, sports, and other video programming.<sup>321</sup> In some markets, Comcast also offers “AnyRoom DVR,” which allows subscribers to share recorded programs with any television in

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<sup>312</sup> Comcast 6/8/11 Comments at 7. In approving the Comcast’s joint venture with General Electric, the Commission concluded that the transaction would give the joint venture the incentive and ability to block – temporarily or permanently – Comcast’s video distribution rivals from accessing programming owned by the joint venture and to raise the programming costs of its video distribution rivals. *Comcast-NBCU Order*, 26 FCC Rcd at 4250, ¶ 29. Given the findings, the Commission adopted an arbitration remedy applicable to all Comcast-NBCU affiliated programming, including regional sports networks, to prevent these potential harms. *Id.* at 4364-70, App. A, § VII. With respect to program carriage, the Commission found that the vertical integration of Comcast’s distribution network with NBCU’s programming assets increased Comcast’s ability and incentive to discriminate against or foreclose unaffiliated programming. *Id.* at 4282, ¶ 110. To remedy these harms, the Commission adopted a program carriage condition prohibiting Comcast from discriminating against programming vendors, including regional sports networks, on the basis of affiliation or nonaffiliation in the selection, price, terms or conditions of carriage. *Id.* at 4287, ¶ 121; *see also id.* at 4358, App. A, § III.1.

<sup>313</sup> For a list of Comcast’s national programming interests, *see* Appendix B, Table B-1.

<sup>314</sup> For a list of Comcast’s regional programming interests, *see* Appendix C, Table C-1.

<sup>315</sup> Comcast 2010 Form 10-K at 2.

<sup>316</sup> Time Warner Cable 2010 Form 10-K at 1.

<sup>317</sup> For a list of Time Warner Cable’s programming interests, *see* Appendix B, Table B-1 and Appendix C, Table C-1.

<sup>318</sup> Comcast 2010 Form 10-K at 3; Comcast 6/8/11 Comments at 9.

<sup>319</sup> Time Warner Cable, <https://www.timewarnercableoffers.com/> (visited Mar. 3, 2012).

<sup>320</sup> Time Warner Cable 2010 Form 10-K at 6.

<sup>321</sup> Comcast 6/8/11 Comments at 8-9, 11.

the house.<sup>322</sup> Similarly, in some markets, Time Warner Cable offers multi-room DVR service with 80 hours of storage for video programs and thousands of VOD titles to digital video subscribers.<sup>323</sup> Time Warner Cable also offers Start Over, a feature that enables customers that have missed the beginning of a live program to watch it from the beginning.<sup>324</sup>

108. Large cable MVPDs have been transitioning to all-digital systems.<sup>325</sup> Most large cable MVPDs currently provide some digital channels in all or nearly all systems and they are continuing to migrate analog channels to digital.<sup>326</sup> Comcast and Cablevision appear to have made the most progress turning off analog channels. For example, 20 percent of Comcast's footprint is currently all-digital. And Cablevision is all-digital in its New York City and Connecticut markets.<sup>327</sup> According to reports, Time Warner Cable, Cox, Charter, and Suddenlink are transitioning to digital more gradually.<sup>328</sup>

109. Comcast's TV Everywhere initiative offers digital subscribers 150,000 online video choices, including on-demand television shows, movies, and video clips, but little or no linear video programming.<sup>329</sup> For subscribers with mobile devices, Comcast's TV Everywhere offers almost 6,000 hours of on-demand video content to subscribers with smart devices.<sup>330</sup> As part of its TV Everywhere service, Time Warner Cable offers subscribers online sports programming from ESPN, ESPN2, ESPN3, to customers who subscribe to a video tier that includes those networks.<sup>331</sup>

110. *Bundling.* Like most cable MVPDs, Comcast and Time Warner Cable sell video services separately and in bundled packages of video, Internet access, and telephone services. Each of these services is provided over their own two-way cable systems. Comcast and Time Warner Cable explain that their primary competition for bundles comes from AT&T and Verizon, which overlap some of their service areas and offer video, Internet access, and telephone services with features and functions comparable to those offered by Comcast and Time Warner Cable.<sup>332</sup>

111. *Marketing.* Comcast now markets its services under the Xfinity brand, which includes Xfinity TV, Xfinity Internet, and Xfinity Voice. In marketing its services, Comcast compares its offerings with those of DBS and telephone MVPDs.<sup>333</sup> Time Warner Cable has begun targeting higher-end demographics with its SignatureHome service that offers an enhanced bundle of video, Internet

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<sup>322</sup> *Id.* at 10.

<sup>323</sup> Time Warner Cable, <http://www.timewarnercable.com/nynj/learn/cable/> (visited Mar. 2, 2012).

<sup>324</sup> *Id.* See also Time Warner Cable 2010 Form 10-K at 3.

<sup>325</sup> Katie Ardmore, *Cable Operators Progressing Slowly Toward All-Digital Systems*, COMM. DAILY, Feb. 22, 2012, at 8-10.

<sup>326</sup> *Id.*

<sup>327</sup> *Id.*

<sup>328</sup> *Id.*

<sup>329</sup> Comcast 6/8/11 Comments at 12-13.

<sup>330</sup> *Id.* at 13.

<sup>331</sup> Time Warner Cable 2010 Form 10-K at 3.

<sup>332</sup> Comcast 2010 Form 10-K at 6; Time Warner Cable 2010 Form 10-K at 8, 9, 20, 38.

<sup>333</sup> See Comcast, <http://www.comcast.com/Corporate/Learn/Compare/comcast-vs-att-U-verse.html?Processed=true> (visited Feb. 28, 2012).

access, and telephone services, and budget-conscious customers with its TV Essentials service that offers video only.<sup>334</sup>

112. *Small and Midsize Incumbent Cable MVPDs.* In this category, we consider four cable MVPDs: (i) Buckeye CableSystem (“Buckeye”), the 22<sup>nd</sup> largest cable MVPD, with approximately 135,000 subscribers in Northwest Ohio; Southeast Michigan; and Erie County, Ohio;<sup>335</sup> (ii) BendBroadband, the 38<sup>th</sup> largest cable MVPD, with approximately 35,000 subscribers in 12 communities in Central Oregon;<sup>336</sup> (iii) Adams Cable Service (“Adams”), the 42<sup>nd</sup> largest cable MVPD with approximately 22,000 subscribers in Carbondale, Pennsylvania;<sup>337</sup> and (iv) Sweetwater Cable, the 52<sup>nd</sup> largest cable MVPD, with approximately 7,000 subscribers in Rock Springs and Green River, Wyoming.<sup>338</sup>

113. *Programming Tiers.* Buckeye offers 250 digital channels and HD channels.<sup>339</sup> BendBroadband offers a range of digital video packages.<sup>340</sup> At the low end is a limited video package with 27 channels and 12 HD channels. At the high end is a preferred video package with 92 channels and 59 HD channels, with the option of adding four genre-based programming tiers (*i.e.*, Variety, with 26 channels and eight HD channels; Sports with 17 channels and six HD channels; Movies, with 19 channels and two HD channels; and Discovery/MTV, with 13 channels). In addition, BendBroadband offers premium channels: HBO, Cinemax, Showtime, and Starz. Adams offers analog and digital video service ranging from a basic package with 17 channels to a digital package with an additional 120 channels and 48 HD channels.<sup>341</sup> Sweetwater Cable offers a basic video service and an expanded basic video service.<sup>342</sup> Prior to 2011, Sweetwater offered only analog video services.<sup>343</sup> Currently, Sweetwater offers 22 channels on its basic service, 48 channels on its expanded basic service and 41 channels on its digital service.<sup>344</sup>

114. *Technology and Advanced Video Services.* Of the four systems studied, two offer comparable HD channels, DVR service, and VOD programming to the largest operators, one offers similar HD offerings but less robust DVR service and VOD programming, and the fourth offers DVR,

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<sup>334</sup> Time Warner Cable 2010 Form 10-K at 6.

<sup>335</sup> Buckeye CableSystem, <http://www.buckeyecablesystem.com/index.html> (visited Oct. 31, 2011).

<sup>336</sup> Communities in Central Oregon served by BendBroadband include: Bend, Black Butte, Culver, LaPine, Madras, Metolius, Prineville, Powell Butte, Redmond, Sisters, Sunriver, and Terrebonne. The company changed its name from Bend Cable to BendBroadband in 2003 in recognition that its services had expanded beyond cable television. See BendBroadband, [http://www.bendbroadband.com/residential/abb\\_company\\_info.asp?pageID=abbb&subID=aci](http://www.bendbroadband.com/residential/abb_company_info.asp?pageID=abbb&subID=aci) (visited Nov. 2, 2011).

<sup>337</sup> Adams Cable Service, <http://www.adamsable.com/cable.html> (visited Nov. 2, 2011).

<sup>338</sup> Sweetwater Cable, <http://www2.sweetwaterhsa.com/> (visited Feb. 13, 2012).

<sup>339</sup> Buckeye CableSystem, <http://www.buckeyecablesystem.com/digital/index.html> (visited Oct. 31, 2011).

<sup>340</sup> BendBroadband, [http://www.bendbroadband.com/residential/dc\\_index.asp?pageID=dc&adct=3](http://www.bendbroadband.com/residential/dc_index.asp?pageID=dc&adct=3) (visited Feb. 26, 2012).

<sup>341</sup> Adams Cable Service, <http://www.adamsable.com/cable.html> (visited Nov. 2, 2011).

<sup>342</sup> Sweetwater Cable, <http://www2.sweetwaterhsa.com/> (visited Feb. 13, 2012).

<sup>343</sup> *Id.*

<sup>344</sup> Sweetwater Cable, <http://www2.sweetwaterhsa.com/digitalcable.html> (visited Feb. 13, 2012).

VOD and limited HD service.<sup>345</sup> Some of these systems are offering innovative services. For example, Buckeye recently introduced Whole Home VOD, which allows subscribers to access VOD programs on any television in the home.<sup>346</sup> BendBroadband offers a service called Alpha, which combines a set-top receiver, cable modem, and wireless router into a single box that can record six video programs simultaneously.<sup>347</sup> Adams offers pay-per-view movies and special events, but appears to offer a more limited selection of free VOD content than that found on the larger cable MVPDs.<sup>348</sup> In addition, the company's DVR service is limited to a single room.

115. Overall, small and mid-sized cable MVPDs are also transitioning to all-digital systems. In a recent survey by the American Cable Association, 50 percent of the 107 cable MVPDs respondents indicate that they plan to either operate an all-digital system, or will be upgrading to all-digital within three years.<sup>349</sup>

116. *Bundling.* Each of the small cable systems we studied now offers Internet access and telephone services.<sup>350</sup> Buckeye offers Internet access and telephone services and "money-saving" bundles similar to large cable MVPDs. BendBroadband offers Internet access (both wireline and wireless) and telephone service, separately and in bundles. Adams offers Internet access and telephone service, separately and in bundles, that appear to be comparable to those offered by larger cable MVPDs. In 2011, Sweetwater upgraded its cable systems to offer digital video service, as well as Internet access and telephone services.<sup>351</sup>

117. *Marketing.* Buckeye's marketing is focused on winning subscribers from DBS MVPDs.<sup>352</sup> The company offers current DBS subscribers \$200 to convert to Buckeye's video service. As added incentives to subscribe to its bundle of services, Buckeye will remove the DBS satellite dish and provide a free month of Internet access and telephone service.

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<sup>345</sup> Buckeye offers 250 digital channels, HD channels, DVR service, and thousands of hours of VOD programming. Buckeye CableSystem, <http://www.buckeyecablesystem.com/digital/index.html> (visited Oct. 31, 2011); BendBroadband offers a total of 108 HD channels, DVR service, and VOD. BendBroadband, [http://www.bendbroadband.com/residential/alpha\\_index.asp?pageID=al&adct=1](http://www.bendbroadband.com/residential/alpha_index.asp?pageID=al&adct=1) (visited Nov. 2, 2011); Adams video services are comparable to those offered by the largest cable MVPDs, but it offers fewer VOD programs and its DVR service does not deliver programs to other televisions throughout the house. Adams Cable Service, <http://www.adamscable.com/index.html> (visited Nov. 2, 2011). According to Sweetwater Cable's website, it offers the Salt Lake City broadcast stations and a number of national cable networks in HD, with plans to add additional HD channels upon availability and system capacity. Sweetwater Cable, <http://www2.sweetwaterhsa.com/digitalcable.html> (visited July 10, 2012).

<sup>346</sup> Buckeye CableSystem, <http://www.buckeyecablesystem.com/vod/index.html> (visited Oct. 31, 2011).

<sup>347</sup> BendBroadband, [http://www.bendbroadband.com/residential/alpha\\_index.asp?pageID=al&adct=1](http://www.bendbroadband.com/residential/alpha_index.asp?pageID=al&adct=1) (visited Nov. 2, 2011).

<sup>348</sup> Adams Cable Service, <http://www.adamscable.com/cable.html> (visited Nov. 2, 2011).

<sup>349</sup> See Letter from Barbara S. Esbin, Counsel to the American Cable Association, to Marlene Dortch, Secretary, FCC, MB Docket No. 11-169, PP Docket No. 00-67 (Feb. 27, 2012).

<sup>350</sup> We note that not all of the smallest cable systems offer Internet access or telephone services. FCC staff analysis shows that 160 cable systems, each with less than 5,000 subscribers, filed a Form 325 for 2010. Of these, five cable systems offered neither Internet access nor telephone service.

<sup>351</sup> Sweetwater Cable, <http://www2.sweetwaterhsa.com/> (visited Feb. 13, 2012).

<sup>352</sup> Buckeye CableSystem, <http://www.buckeyecablesystem.com/nodish/index.html> (visited Oct. 31, 2011).

**(ii) DBS MVPD Business Models and Competitive Strategies**

118. DIRECTV is the second largest MVPD, with approximately 19 million subscribers in the United States.<sup>353</sup> The company is organized into two operating segments: DIRECTV U.S. and DIRECTV Latin America.<sup>354</sup> DIRECTV has ownership interests in Root Sports, a group of RSNs, and a 65 percent interest in Game Show Network, a cable television network dedicated to game-related programming and Internet interactive game playing.<sup>355</sup> DISH Network is the third largest MVPD, with approximately 14 million subscribers.<sup>356</sup> The company does not have significant ownership interests in programming networks. DISH Network recently acquired Blockbuster, Inc. and now offers DVDs and online streaming of video programming.<sup>357</sup>

119. *Programming Tiers.* At the end of 2010, DIRECTV offered over 285 all-digital channels, 160 national HD channels, and four 3D channels.<sup>358</sup> At the end of 2010, DIRECTV offered local broadcast television stations (also called local-into-local service) in 172 television markets and local broadcast television HD channels in 155 television markets.<sup>359</sup> DIRECTV also has exclusive rights to offer the NFL SUNDAY TICKET, which allows subscribers to view the largest selection of NFL games during the regular season.<sup>360</sup> At the end of 2010, DISH Network offered 280 video channels and 215 national HD channels.<sup>361</sup> At the end of 2010, DISH Network offered local broadcast television stations in all 210 television markets and local broadcast television HD channels in more than 160 markets.<sup>362</sup> In 2010, DISH Network also offered 250 Latino and international channels, 30 premium movie channels, 35 regional and specialty sports channels, and 55 channels of pay-per-view content.<sup>363</sup>

120. *Technology and Advanced Video Services.* DIRECTV and DISH Network use an all-digital, one-way technology to deliver video programming to set-top receivers. Subscribers receive programming through a small satellite dish. DIRECTV uses 12 geosynchronous satellites (eleven owned and one leased).<sup>364</sup> DISH Network uses 13 satellites (six owned, five leased from EchoStar, and two

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<sup>353</sup> DIRECTV 2010 Form 10-K at 2.

<sup>354</sup> In this Report, we focus only on the DIRECTV U.S. segment.

<sup>355</sup> DIRECTV 2010 Form 10-K at 2.

<sup>356</sup> DISH Network 6/8/11 Comments at 2.

<sup>357</sup> DISH Network, *Dish Network Agrees to Acquire Blockbuster Assets* (press release), Apr. 6, 2011; DISH Network, <http://www.dishnetwork.com/blockbuster/> (visited Jan. 25, 2012).

<sup>358</sup> DIRECTV 6/8/2011 Comments at 10.

<sup>359</sup> *Id.* DIRECTV has been expanding its local-into-local service and currently offers local broadcast television stations in 194 television markets and local broadcast television HD channels in 181 markets. DIRECTV, [http://www.directv.com/DTVAPP/content/hd/hd\\_locals](http://www.directv.com/DTVAPP/content/hd/hd_locals) (visited Apr. 6, 2012).

<sup>360</sup> DIRECTV, [http://www.directv.com/DTVAPP/content/about\\_us/our\\_company](http://www.directv.com/DTVAPP/content/about_us/our_company) (visited Feb. 26, 2012).

<sup>361</sup> DISH Network 2010 Form 10-K at 1-2.

<sup>362</sup> *Id.*

<sup>363</sup> *Id.*

<sup>364</sup> DIRECTV 2010 Form 10-K at 6.